Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

(A)

No. 02-1201

IN THE

Supreme Court of the United States

DIANA DUNCAN,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

General Motors reduces Mrs. Duncan's argument to the proposition that "jury verdicts in discrimination cases are sacrosanct" and that those verdicts "should be insulated from appellate review." Resp't's Br. at 9, 11. Mrs. Duncan makes no such claim. She demonstrates that the Court of Appeals majority substituted its placement of the line between harassment that makes a work environment hostile and harassment that does not for that of a properly instructed jury. Mrs. Duncan asks this Court to determine whether that substitution usurped the fact-finding function of juries in Title VII sexual harassment cases.

General Motors recognizes that all sexual harassment cases are "intensely fact-specific." Resp't's Br. at 12. In the Civil Rights Act of 1991, Congress provided for jury trials in those cases. Whether behavior constitutes harassment is a question of fact reserved for the jury, not the judges. See Pet. at 8-12.

I. This Case Presents the Question Of Whether and Under What Circumstances An Appellate Court May Substitute Its Assessment Regarding the Effect of Sexual Harassment Upon a Plaintiff's Work Environment for That of a Properly Instructed Jury.

The determination of whether a work environment was hostile is fact-intensive and depends upon "looking at all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22-23 (1993). "[I]nterpreting [the] subtle sexual dynamics of the workplace" is peculiarly within the ken of jurors. *Gallagher v. Delaney*, 139 F.2d 338, 342 (2d Cir.

1998). It is reasonable to assume that Congress had that insight when it provided for jury trials in the Civil Rights Act of 1991. Justice Scalia noted in his separate opinion in *Harris* that Congress did not establish a bright-line test for identifying actionable workplace harassment. 510 U.S. at 24 (Scalia, J., concurring). That omission is at least a legislative signal, if not a mandate, that jurors are to be left alone to decide whether particular instances of sexual harassment resulted in a hostile work environment.

In his *Harris* concurrence Justice Scalia observed that the principal opinion would insure that "virtually unguided juries" make those determinations. *Id.* The respondent characterizes the concurring opinion as a lament of the standard for actionable sexual harassment articulated by the majority and suggests that the concurrence "certainly does not support" Mrs. Duncan's position. Resp't's Br. at 10-11. This was not a dissent: Justice Scalia recognized "the inherently vague statutory language" governing the identification of illegal sexual harassment and acknowledged that there was "no alternative" to the result that the Court had reached. 510 U.S. at 24-25. At the very least, the opinion highlights the absence of clarity about when a trial or appellate court may undo a jury's placement of the line separating mere offensive conduct from prohibited sexual harassment and replace it with its own.[1]

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[1] Judicial usurpation of the line-drawing function earmarked for juries in Title VII cases encroaches as well upon the prerogative of Congress:

> It is Congress that enacted Title VII. When we ignore the congressional mandate, as interpreted by the Supreme Court, we become most vulnerable to the charge that we, as members of the unelected federal judiciary, are usurping the legislative prerogative.

General Motors suggests that the Court of Appeals majority did not reweigh the evidence and complains that Mrs. Duncan "points to no specific credibility determinations, recalibration of evidence, or inference drawing by the Court of Appeals." Resp't's Br.at 11-12. That contention ignores this Court's recognition that the existence or non-existence of a hostile work environment is peculiarly dependent upon factual determinations. *Harris,* 510 U.S. at 22-23. It also is inconsonant with thoughtful consideration of the Court of Appeals majority's opinion.

The majority opinion is replete with conclusions necessarily based upon second-hand weighing of evidence and assessment of credibility, and Mrs. Duncan did identify such components of the opinion in her petition. Pet. at 11 n.6. The panel majority's treatment of evidence regarding the net effect of harassment suffered by Mrs. Duncan is illustrative. The opinion notes that Mrs. Duncan was "disturbed" by her functional supervisor's "boorish advances and . . . behavior" but concludes that she failed to demonstrate "that these occurrences in the aggregate were so severe and extreme that a reasonable person would find . . . the terms or conditions of [her] employment had been altered." Pet. at 9a.

The panel could not have reached its conclusion without reweighing Mrs. Duncan's testimony about the effect that the harassment had upon her.[2] She said: "There

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Mendoza v. Borden, Inc., 195 F.3d 1238, 1269 (11th Cir. 1999) (Tjoflat, J., concurring and dissenting). Judge Tjoflat noted Justice Scalia's concurrence in *Harris* and observed, as Justice Scalia had implied, that "the solution lies with Congress and not the Third Branch." *Id.*

[2] No evidence suggested that Mrs. Duncan was an especially sensitive or emotionally weak individual.

were good days and bad days . . . . On a good day I could smile." (Tr. at 319.) She described the bad days: "There were days when I would leave crying. There were days I would be throwing up. I had diarrhea. I couldn't sleep. There were mornings I didn't even want to get up and come in." (Tr. at 320.) Mrs. Duncan was asked about the frequency of the bad days, and she replied: "There are times it could have been every day for a week. [There] were times there may have been two or three weeks where nothing happened. But once he started, he didn't stop." (Tr. at 321.) She added: "There were nights I couldn't even do my kids' homework with them. I couldn't cook dinner. I would be too upset. All I wanted to do was go home and go to bed." (Tr. at 320.) And she explained the consequences that persisted until the time of trial:

> I take great pride in any job I do. I am a good mother. I second-guess everything I do now, even up to today. If my current boss tells me I have done well, I—I feel like I should have done more . . . I don't have any self-esteem. I lost a lot of my pride. I am embarrassed I didn't stand up for myself sooner, that I was afraid.

(Tr. at 320.)

The District Court instructed the jury that it could return a verdict in favor of Mrs. Duncan only if it found that she had been subjected to sexual harassment "sufficiently severe or pervasive that a reasonable person in [her] position would find [her] work environment hostile." (Tr. at 1100-01.) The jury made that finding. (App. at 288-89.) The Court of Appeals majority replaced the jury's determination with its own.

Nor is it reasonable for General Motors to suggest that inference-tampering is hard to find in the majority opinion. Judge Arnold's dissent points out liberties taken in that regard:

> Mrs. Duncan was subjected to a sexual advance by her supervisor within days of beginning her job. This proposition occurred during work hours and was a direct request for a sexual relationship. The Court characterizes this incident as a "single request" . . . This description minimizes the effect of the sexual advance on Ms. Duncan's working conditions. During the months immediately following this incident, Mr. Booth became hostile to Ms. Duncan, increased his criticism of her work, and degraded her professional capabilities in front of her peers. Significantly, there is no suggestion that this hostile behavior occurred *before* Ms. Duncan refused his request for sex. From this evidence, a jury could easily draw the inference that Mr. Booth changed his attitude about Ms. Duncan's work because she rejected his sexual advance.

Pet. at 14a (emphasis in original). Of course Judge Arnold's observation also suggests the majority's recalibration of evidence and reassessment of credibility.

General Motors argues that "appellate scrutiny" of verdicts in favor of plaintiffs in sexual harassment cases is essential to police "the often-thin line" between mere rudeness and actionable discrimination. Resp't's Br. at 13. Mrs. Duncan seeks this Court's review precisely because of the indistinctness of the line, the factual nature of the inquiry

required to draw it in a given case, and the tendency of appellate judges to substitute their notions for those of juries. General Motors recognizes that sexual harassment cases are "intensely fact-specific" but fails to acknowledge the critical role that Congress assigned to juries in those cases. Resp't's Br. at 12.

General Motors contends that appellate court intervention in the characterization of harassing conduct as merely offensive or illegally discriminatory "is necessary to provide as much balance and legal oversight as possible." *Id.* As the plethora of irreconcilable appellate court decisions cited in Mrs. Duncan's petition attest, the Courts of Appeals have not come close to establishing a comprehensible standard for distinguishing between conduct that is only boorish and that which renders a workplace hostile. Pet. at 13-16.

II. General Motors' Invocation of Alternative Bases for the Result Reached By the Court of Appeals Should Not Preclude This Court From Considering the Issue Presented By the Petition.

General Motors urges this Court to refuse to review this case on the basis of issues that the respondent raised in the Court of Appeals and that were not decided by that court. Brief in Opposition at 14-15. It contends that those claims were "sufficient bases" for the result reached by the Court of Appeals majority and that this Court therefore should not grant the writ requested by Mrs. Duncan. *Id.* Although General Motors will be free to defend the judgment of the Court of Appeals "on any ground supported by the record" if review is granted, *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997), the presence of arguments unreached by that court should not preclude this Court from considering the issue that proved dispositive. *See* Sup. Ct. R. 10 (noting the

Court's discretion with respect to review by certiorari and the requirement of "compelling reasons" for such review, and including the dubious resolution of an important question of federal law as such a reason); *see also Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting that the Court need not address a claim "outside the scope of the question presented").[3]

The present Court of Appeals decision inevitably will chill the assertion of claims by women subjected to sexual harassment in their workplaces. The willingness of individuals who have been victimized by sexual harassment on their jobs to take on the economic, social, and emotional costs of pursuing their claims in court surely will be diminished if the daunting achievement of having obtained a jury's verdict can be undone by a majority of three appellate judges at liberty to reweigh and reinterpret the evidence that correctly instructed jurors found persuasive. The opinion of the Court of Appeals majority is likely to thwart the Title VII legislation. That opinion invites the substitution of appellate court fact-finding for congressionally mandated jury fact-finding. Those are "compelling reasons" for review by this Court. The fact that other issues may remain to be resolved in this Court or on remand has no bearing on the importance

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[3] Mrs. Duncan concedes nothing with regard to either of the ghost issues invoked by the respondent. She prevailed on both issues in the District Court and briefed and argued both as appellee in the Court of Appeals. The Court of Appeals majority found neither of those theories sufficiently compelling to warrant inclusion in its opinion. Judge Arnold surely would have refrained from dissenting and concurred, separately or not, if he found either issue adequate to support the result reached by the majority. This Court may elect to address those issues or leave them for disposition on remand. *Bennett*, 520 U.S. at 166-67. But generally the Court "do[es] not address arguments that were not the basis for the decision below." *Matsushita*, 516 U.S. at 379 n.5.

of the question presented in Mrs. Duncan's petition for a writ of certiorari.

CONCLUSION

For the reasons set forth in the petition for a writ of certiorari and in this reply brief, the petition should be granted.

Respectfully submitted,

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